

Adam Hosmer-Henner (NSBN 12779)  
Chelsea Latino (NSBN 14227)  
Jane Susskind (NSBN 15099)  
**McDONALD CARANO LLP**  
100 West Liberty Street, Tenth Floor  
Reno, Nevada 89501  
(775) 788-2000  
ahosmerhenner@mcdonaldcarano.com  
clatino@mcdonaldcarano.com  
jsusskind@mcdonaldcarano.com

Boris Bershteyn (*pro hac vice*)  
Ken Schwartz (*pro hac vice*)  
Michael Menitove (*pro hac vice*)  
Sam Auld (*pro hac vice*)  
**SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP**  
One Manhattan West  
New York, New York 10001  
(212) 735-3000  
Boris.Bershteyn@skadden.com  
Ken.Schwartz@skadden.com  
Michael.Menitove@skadden.com  
Sam.Auld@skadden.com

*Attorneys for Defendant  
Caesars Entertainment, Inc.*

[Additional counsel listed on Signature Page]

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

RICHARD GIBSON, and HERIBERTO  
VALIENTE,

Plaintiff,

v.

MGM RESORTS INTERNATIONAL,  
CENDYN GROUP, LLC, THE RAINMAKER  
GROUP UNLIMITED, INC., CAESARS  
ENTERTAINMENT INC., TREASURE  
ISLAND, LLC, WYNN RESORTS HOLDINGS,  
LLC,

Defendants.

Case No. 2:23-cv-00140-MMD-DJA

**DEFENDANTS' JOINT MOTION  
TO DISMISS THE COMPLAINT WITH  
PREJUDICE**

**ORAL ARGUMENT REQUESTED**

**DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS'  
CLASS ACTION COMPLAINT FOR FAILURE TO STATE A CLAIM**

Defendants Cendyn Group, LLC ("Cendyn"), the Rainmaker Group Unlimited, Inc. ("Rainmaker"), Caesars Entertainment, Inc. ("Caesars"), Treasure Island, LLC ("Treasure Island"), Wynn Resorts Holdings, LLC ("Wynn"), and MGM Resorts International ("MGM"), by and through their respective counsel, move this Court to dismiss the above-entitled action with prejudice. This Motion is made under Federal Rule of Civil Procedure 12(b)(6) and LR 7-2 and is based on the attached Memorandum of Points and Authorities and supporting documentation, the papers and pleadings on file, and any oral argument this Court may allow.

Dated: March 27, 2023

Respectfully submitted,

/s/ Adam Hosmer-Henner

Adam Hosmer-Henner (NSBN 12779)  
Chelsea Latino (NSBN 14227)  
Jane Susskind (NSBN 15099)  
McDONALD CARANO LLP  
100 West Liberty Street, Tenth Floor  
Reno, Nevada 89501  
(775) 788-2000  
ahosmerhenner@mcdonaldcarano.com  
clatino@mcdonaldcarano.com  
jsusskind@mcdonaldcarano.com

Boris Bershteyn (*pro hac vice*)  
Ken Schwartz (*pro hac vice*)  
Michael Menitove (*pro hac vice*)  
Sam Auld (*pro hac vice*)  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
One Manhattan West  
New York, New York 10001  
(212) 735-3000  
Boris.Bershteyn@skadden.com  
Ken.Schwartz@skadden.com  
Michael.Menitove@skadden.com  
Sam.Auld@skadden.com

*Attorneys for Defendant  
Caesars Entertainment, Inc.*

/s/ Todd L. Bice

Todd L. Bice (NSBN 4534)  
Brianna Smith (NSBN 11795)  
PISANELLI BICE PLLC  
400 S. 7th Street, Suite 300  
Las Vegas, NV 89101  
Telephone: 702-214-2100  
tlb@pisanellibice.com  
bgs@pisanellibice.com

Bethany Kristovich (*pro hac vice*)  
Kyle Mach (*pro hac vice*)  
Justin Raphael (*pro hac vice*)  
Juliana Yee (*pro hac vice*)  
MUNGER, TOLLES & OLSON LLP  
350 S. Grand Ave., 50th Floor  
Los Angeles, CA 90071  
Telephone: 213 683 9100  
bethany.kristovich@mto.com  
kyle.mach@mto.com  
justin.rafael@mto.com  
juliana.yee@mto.com

*Attorneys for Defendant MGM Resorts  
International*

/s/ Patrick G. Byrne

Patrick G. Byrne  
Nevada Bar No. 7636  
Bradley Austin  
Nevada Bar No. 13064  
SNELL & WILMER  
3883 Howard Hughes Parkway  
Las Vegas, NV 89169  
Telephone: (702) 784-5200  
Facsimile: (702) 784-5252  
pbyrne@swlaw.com  
baustin@swlaw.com

Mark Holscher (*pro hac vice*)  
Tammy Tsoumas (*pro hac vice*)  
Leonora Cohen (*pro hac vice*)  
KIRKLAND & ELLIS LLP  
2049 Century Park East, Suite 3700  
Los Angeles, California 90067  
Telephone: (310) 552-4200  
Facsimile: (310) 552-5900  
ttsoumas@kirkland.com  
mholscher@kirkland.com  
lena.cohen@kirkland.com

Matthew Solum (*pro hac vice*)  
KIRKLAND & ELLIS LLP  
601 Lexington Ave  
New York, NY 10022  
Telephone: (212) 446-4688  
Facsimile: (917) 848-7536  
msolum@kirkland.com

*Attorneys for Defendant Wynn  
Resorts Holdings, LLC*

/s/ Patrick J. Reilly

Patrick J. Reilly  
Arthur A. Zorio  
Emily Garnett (*pro hac vice*)  
Eric D. Walther  
BROWNSTEIN HYATT FARBER  
SCHRECK, LLP  
100 North City Parkway, Ste. 1600  
Las Vegas, NV 89106  
Telephone: 702.382.2101  
preilly@bhfs.com  
azorio@bhfs.com  
egarnett@bhfs.com  
ewalther@bhfs.com

*Attorneys for Defendant Treasure Island, LLC*

/s/ J. Colby Williams

J. Colby Williams (5549)  
710 South Seventh Street  
Las Vegas, NV 89101  
Telephone: (702) 382-5222  
Facsimile: (702) 382-0540  
jcw@cwalawlv.com

Sadik Huseny (*pro hac vice*)  
Tim O'Mara (*pro hac vice*)  
Brendan A. McShane (*pro hac vice*)  
LATHAM & WATKINS LLP  
505 Montgomery Street, Suite 2000  
San Francisco, CA 94111-6538  
Telephone: (415) 391-0600  
Facsimile: (415) 395-8095  
sadik.huseny@lw.com  
tim.o'mara@lw.com  
brendan.mcshane@lw.com

Anna M. Rathbun (*pro hac vice*)  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW Suite 1000  
Washington, DC 20004-1304  
Telephone: (202) 637-3381  
Facsimile: (202) 637-2201  
anna.rathbun@lw.com

*Attorneys for Defendant Cendyn Group LLC*

1 /s/ Nicholas J. Santoro

2 Nicholas J. Santoro (NV Bar No. 532)  
3 300 S. 4<sup>th</sup> Street, Suite 1600  
4 Las Vegas, NV 89101  
Tel.: (702) 791-0308 / Fax: (702) 791-1912  
nsantoro@nevadafirm.com

5 Arman Oruc (*pro hac vice forthcoming*)  
6 GOODWIN PROCTER LLP  
7 1900 N Street, N.W.  
Washington, DC 20036-1612  
8 Tel.: (202) 346-4000 / Fax: (202) 346-4444  
AOruc@goodwinlaw.com

9 Alicia Rubio-Spring (*pro hac vice*)  
10 GOODWIN PROCTER LLP  
11 100 Northern Avenue  
Boston, MA 02110  
12 Tel.: (617) 570-1000 / Fac: (617) 523-1231  
ARubio-Spring@goodwinlaw.com

13 *Attorneys for Defendant The Rainmaker Group*  
14 *Unlimited, Inc.*

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**MEMORANDUM OF POINTS AND AUTHORITIES****PRELIMINARY STATEMENT**

Plaintiffs fail to answer any of the “basic questions” that the Ninth Circuit requires to plausibly allege an antitrust conspiracy in violation of Section 1 of the Sherman Act—that is, “who, did what, to whom (or with whom), where, and when?” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008). Plaintiffs purport to represent a class of individuals who rented hotel rooms on the Las Vegas Strip, and they bring a single claim alleging that Hotel Defendants somehow conspired to use one or more of the revenue management products offered by defendants Rainmaker/Cendyn.<sup>1</sup> But plaintiffs fail to allege virtually any facts regarding that purported conspiracy, let alone enough to pass muster under the pleading standards set forth in *Kendall* and other controlling precedent.

First, the complaint fails at the outset because it is missing every essential ingredient necessary to plead an antitrust conspiracy under Ninth Circuit law. The complaint fails to identify any individual “who” entered into the purported conspiracy. The complaint not only fails to allege “when” the purported conspiracy began, but it also concedes that plaintiffs have no idea when it began. The complaint similarly lacks allegations regarding “what” the Hotel Defendants agreed to, how the purported agreement operates, or how defendants monitor or enforce the purported agreement. Plaintiffs fail to even allege that Hotel Defendants agreed to use the same revenue management product at the same time at their hotels on the Las Vegas Strip. Instead, plaintiffs resort to generic allegations about algorithms and allegations about hotels that are thousands of miles away from the Las Vegas Strip. Courts have repeatedly dismissed antitrust claims for failing to plead the details that are missing here because such barebones complaints are “almost impossible to defend against, particularly where the defendants are large institutions.” *Id.* at 1047.

Second, plaintiffs fail to meet their burden to plead facts reflecting direct or circumstantial evidence to plausibly suggest an illegal agreement among competitors. The complaint does not plead any direct evidence of a conspiracy. Indeed, there is not even a single alleged communication between any Hotel Defendants, much less any communication that directly

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<sup>1</sup> Hotel Defendants are Caesars, Treasure Island, MGM, and Wynn.

1 establishes an agreement between or among Hotel Defendants.

2 Plaintiffs similarly fail to plead facts to support a plausible inference of conspiracy through  
3 circumstantial evidence. Plaintiffs do not plead that Hotel Defendants acted in parallel—i.e., that  
4 they engaged in the same conduct at the same time such that a conspiracy can be inferred. For  
5 instance, plaintiffs do not allege that each Hotel Defendant began using—or ever used—any  
6 revenue management product at the same time. Nor do plaintiffs allege facts plausibly suggesting  
7 that Hotel Defendants used the same revenue management product, or ever adopted the “pricing  
8 recommendations” offered by the Rainmaker/Cendyn revenue management products for their  
9 hotels on the Las Vegas Strip, much less at the same time. Plaintiffs do not allege facts plausibly  
10 suggesting that Hotel Defendants raised room prices at the same time, or that they shifted their  
11 pricing as a result of using any of the revenue management products. And plaintiffs’ generic  
12 allegations regarding algorithms and non-defendant hotels’ purported use of revenue management  
13 products thousands of miles away from the Strip add nothing to their claim here and only  
14 underscore that similar allegations regarding Hotel Defendants’ use of those products are missing  
15 from the complaint.

16 Because the complaint pleads no parallel conduct, plaintiffs’ alleged “plus factors” are  
17 irrelevant as a matter of law. Moreover, they are incapable of supporting plaintiffs’ claim under  
18 controlling precedent. If anything, the complaint alleges several reasons why a hotel might  
19 independently—and lawfully—choose to use Rainmaker/Cendyn’s revenue management products:  
20 Those products were allegedly advertised as enabling hotels to (1) optimize their revenue  
21 management decisions and (2) forecast and manage demand more efficiently.

22 In short, because an agreement is an essential element of plaintiffs’ sole claim for violation  
23 of the Sherman Act, their inability to plead facts plausibly suggesting an agreement among Hotel  
24 Defendants compels dismissal of the complaint.

## **THE COMPLAINT’S ALLEGATIONS**

### **I. The Rainmaker/Cendyn Revenue Management Software Products**

Plaintiffs allege that defendant Rainmaker “operates as a wholly owned subsidiary” of defendant Cendyn since August 2019, and that it provides software and services to hotels nationwide. (ECF No. 1 ¶¶ 4, 24, 30, 51.)<sup>2</sup> The complaint discusses three distinct Rainmaker “revenue management software” products that allegedly assist hotels in forecasting and managing demand and pricing: GuestRev, RevCaster, and GroupRev (collectively, the “Revenue Management Products”). (*Id.* ¶ 11.) These Revenue Management Products allegedly allow hotels that use them to increase their revenues and profitability, including by “up to 15%” at certain unidentified hotels. (*Id.* ¶¶ 24, 52.) Foxwoods, a non-party Rainmaker client with hotels in New England, allegedly reported producing 70% of the prior year’s revenue from 50% of the volume during the market downturn caused by COVID-19. (*Id.* ¶ 24.)

The complaint relies on three unidentified purported former Rainmaker employees (who plaintiffs claim are “confidential witnesses”) to allege the workings of the Revenue Management Products. For instance, plaintiffs allege that Rainmaker collects data from subscribing hotels, that subscribing hotels “would tell Rainmaker who their competitors were,” and that the algorithms offered by the Revenue Management Products could then be “designed to forecast and recommend” hotel room rates for “individual travelers” and forecast “the dollar amount that those visitors were likely to spend at the casino.” (*Id.* ¶¶ 7, 12, 14-15, 22, 56-59.) One “confidential witness” supposedly stated that unidentified Rainmaker “products are used by 90% of the hotels on the Las Vegas Strip.” (*Id.* ¶ 7.) The “confidential witnesses” do not identify the information that subscribing hotels receive from the Revenue Management Products. Those “confidential witnesses” also do not claim that subscribing hotels receive any non-public information about their competitors from the Revenue Management Products. Similarly, the complaint does not allege that any of the Revenue Management Products’ pricing recommendations for any hotel’s rooms were based on confidential or non-public information provided by any other hotel.

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<sup>2</sup> Although this statement is factually inaccurate, as explained to plaintiffs prior to this filing, defendants accept it (and the other facts alleged in the complaint) as true for purposes of this motion only. Defendants reserve the right to challenge plaintiffs’ allegations in the future.

## 1 II. Allegations About the Las Vegas Strip and Hotel Defendants

2 The Las Vegas Strip “welcomes 42 million visitors every year” and, in 2022, it “was the  
3 number one most popular destination that Americans plan to visit.” (*Id.* ¶ 40.) Hotels on the Strip  
4 offer guests “access to casinos, concert events, and shopping,” which are allegedly “as much a part  
5 of their experience as the room they rent.” (*Id.*) Defendants Caesars, Treasure Island, Wynn, and  
6 MGM operate approximately 20 hotels on the Las Vegas Strip. (*Id.* ¶¶ 28, 31-33, 43.) Beyond  
7 those allegations, the complaint does not offer any information regarding each Hotel Defendant’s  
8 amenities, room rates, guest profiles, or occupancy rates for their hotels on the Strip. Nor does the  
9 complaint allege how each of those attributes compares across the Hotel Defendants’ Las Vegas  
10 Strip hotels. For instance, the complaint does not allege any facts suggesting that a prospective  
11 guest would book a room at Treasure Island if a room at the Wynn was unavailable.

12 According to the complaint, “[s]ince gaming revenue is . . . significantly higher than room  
13 revenue,” casino hotels have historically “over-discount[ed] and comp[ed] rooms without real-time  
14 data to back up those decisions.” (*Id.* ¶ 45.) The Revenue Management Products allegedly assist  
15 casino hotels in “back[ing] up” those decisions. (*Id.*) The complaint does not identify which  
16 Revenue Management Product (if any) any Hotel Defendant used or allege that any Hotel  
17 Defendant ever adopted that Revenue Management Product’s pricing recommendations.

18 Nor are there any allegations that subscribing hotels are required to use the room rates  
19 recommended by the Revenue Management Products. While the complaint cites Rainmaker  
20 promotional materials allegedly stating that recommendations from GuestRev are accepted 90% of  
21 the time across all hotel subscribers nationwide (*see id.* ¶ 12), the complaint does not identify the  
22 frequency (if any) with which hotels on the Las Vegas Strip adopt GuestRev’s (or any other  
23 Revenue Management Product’s) pricing recommendations. The complaint is also silent about  
24 when any Hotel Defendant began subscribing to a Revenue Management Product, except that it  
25 cites an article suggesting that a Treasure Island employee commented on one of those products in  
26 2012. (*Id.* ¶ 16.)

27 Plaintiffs do not allege what rate any (let alone each) Hotel Defendant charged for a room  
28 on the Las Vegas Strip. Instead, plaintiffs allege that “Travel Weekly found that Las Vegas visitors

1 ‘paid the highest average daily room rate (ADR) in the city’s history in September [2022], a trend  
 2 that will likely continue.’” (*Id.* ¶ 23.) This Travel Weekly article identifies several factors driving  
 3 the Las Vegas-wide increase, including pent-up demand from post-pandemic travel and an  
 4 increasing number of sporting and special events, such as music festivals and the Oakland Raiders  
 5 relocating to Las Vegas.<sup>3</sup> The article also explains that hotels on the Strip face rising inflation-  
 6 driven costs.<sup>4</sup>

### 7 **III. The Alleged Conspiracy Among Hotel** 8 **Defendants To Use the Revenue Management Products**

9 The complaint alleges that, “[b]eginning at a time currently unknown to [p]laintiffs,” Hotel  
 10 Defendants agreed “to use pricing algorithms provided by Rainmaker Group.” (*Id.* ¶¶ 87-89.) The  
 11 complaint does not identify which, if any, algorithm Hotel Defendants allegedly “agreed” to use. It  
 12 also does not identify how the supposed agreement among Hotel Defendants was formed or which  
 13 employees reached it. Nor does the complaint allege how the purported agreement has operated or  
 14 has been monitored and enforced.

15 The complaint also does not identify any communication between or among Hotel  
 16 Defendants about the Revenue Management Products, room rates, or anything else. Although the  
 17 complaint alleges that Hotel Defendants supposedly “understand” or “probably knew” that their  
 18 competitors “participate in and contribute data to” the Revenue Management Products (*id.* ¶¶ 10,  
 19 22, 74), the complaint does not allege that any Hotel Defendant began using a Revenue  
 20 Management Product because another Hotel Defendant was using it.

21 Instead, the complaint alleges that Rainmaker hosted an in-person annual user conference  
 22 where unidentified hotel and Rainmaker executives had the opportunity to “network, exchange  
 23 insights and ideas, and discuss revenue management tools and new products coming.” (*Id.* ¶ 74.)  
 24 Plaintiffs allege that hotels would “typically send employees from their revenue management  
 25 teams” (*id.*), but do not allege that any Hotel Defendant attended any particular conference.

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27 <sup>3</sup> Paul Szydelko, *Room rates are through the roof in Las Vegas. What’s behind the surge?*, Travel  
 28 Weekly, (Nov. 15, 2022), <https://www.travelweekly.com/North-America-Travel/Insights/Las-Vegas-hotel-room-rates-set-a-record-in-September>.

<sup>4</sup> *Id.*

1 Plaintiffs also allege that the purported features of the market structure of the Las Vegas  
 2 Strip constitute “plus factors” that render a conspiracy more likely, including high barriers to entry  
 3 (*id.* ¶ 70), high market concentration (*id.* ¶ 71), inelastic consumer demand (*id.* ¶ 72), and the  
 4 relative fungibility of hotel rooms (*id.* ¶ 73).

### 5 ARGUMENT

6 The complaint does not plausibly state its sole claim of conspiracy in violation of Section 1  
 7 of the Sherman Act. For a Section 1 claim, “[t]he crucial question is whether the challenged  
 8 anticompetitive conduct ‘stem[s] from independent decision or from an agreement.’” *Bell Atl. Co.*  
 9 *v. Twombly*, 550 U.S. 544, 553 (2007) (alterations in original) (citation omitted). “Therefore, a  
 10 claim brought under Section 1 must contain sufficient factual matter, taken as true, to plausibly  
 11 suggest that an illegal agreement was made.” *In re Dynamic Random Access Memory (DRAM)*  
 12 *Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 46 (9th Cir. 2022) (citing *Twombly*, 550 U.S. at  
 13 556). Bare conclusions that defendants reached an “agreement” can be discarded, and allegations  
 14 that “are no more consistent with an illegal agreement than with rational and competitive business  
 15 strategies, independently adopted by firms . . . are insufficient.” *In re Musical Instruments &*  
 16 *Equip. Antitrust Litig.*, 798 F.3d 1186, 1189 (9th Cir. 2015) (citing *Twombly*, 550 U.S. at 557).  
 17 Allegations that defendants engaged in “parallel conduct” are also insufficient to infer an  
 18 agreement because parallel conduct “could just as well be lawful independent action.” *In re*  
 19 *DRAM*, 28 F.4th at 47 (alteration in original) (quoting *Twombly*, 550 U.S. at 557).

20 In applying those principles, the Ninth Circuit requires “plaintiffs bringing a claim under  
 21 Section 1 of the Sherman Act” to plead “something more . . . that places their allegations of parallel  
 22 conduct in a context suggesting a preceding agreement.” *Id.* at 45 (quoting *Twombly*, 555 U.S. at  
 23 557). This “higher standard” is warranted by practical considerations in antitrust cases, where  
 24 proceeding to discovery ‘frequently causes substantial expenditures and gives the plaintiff the  
 25 opportunity to extort large settlements even where he does not have much of a case.’” *Id.* at 47  
 26 (emphasis added) (quoting *Kendall*, 518 F.3d at 1047); *see also Twombly*, 550 U.S. at 558 (“[I]t is  
 27 one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite  
 28 another to forget that proceeding to antitrust discovery can be expensive.” (citation omitted)).

1 To meet these pleading standards, plaintiffs must allege either direct evidence of a  
 2 conspiracy or rely on circumstantial evidence by alleging parallel conduct combined with “plus  
 3 factors.” *Musical Instruments*, 798 F.3d at 1193. But no matter which path plaintiffs choose,  
 4 plaintiffs must answer *Kendall*’s questions about the particulars of the alleged conspiracy.  
 5 *Kendall*, 518 F.3d at 1048.

6 Here, the complaint fails at the outset because it does not answer *Kendall*’s “basic  
 7 questions”—“who, did what, to whom (or with whom), where, and when?” *Id.* Indeed, as  
 8 explained below, plaintiffs fail to identify which Revenue Management Product any Hotel  
 9 Defendant used (if any), when or how any Hotel Defendant used it (if ever), what information was  
 10 shared (if any), or whether any Hotel Defendant actually adopted any Revenue Management  
 11 Product’s pricing recommendations. The complaint fails to identify a single communication  
 12 between Hotel Defendants, much less one that suggests a conspiracy was afoot. Unsurprisingly,  
 13 the complaint likewise fails to plead any direct or circumstantial evidence of a conspiracy.

14 **I. PLAINTIFFS FAIL TO ANSWER THE “BASIC QUESTIONS” REQUIRED**  
 15 **BY THE NINTH CIRCUIT TO ALLEGE AN ANTITRUST CONSPIRACY**

16 The complaint should be dismissed because it fails to answer the mandatory pleading  
 17 questions established by the Ninth Circuit. “To withstand a motion to dismiss under Federal Rule  
 18 of Civil Procedure 12(b)(6),” an antitrust plaintiff must answer “‘basic questions’ such as ‘who, did  
 19 what, to whom (or with whom), where, and when?’” *Bona Fide Conglomerate, Inc. v.*  
 20 *SourceAmerica*, 691 F. App’x 389, 390 (9th Cir. 2017) (quoting *Kendall*, 518 F.3d at 1048). That  
 21 requirement means that “the complaint must allege facts such as a ‘specific time, place, or person  
 22 involved in the alleged conspiracies’ to give a defendant seeking to respond to allegations of a  
 23 conspiracy an idea of where to begin.” *Kendall*, 518 F.3d at 1047 (quoting *Twombly*, 550 U.S. at  
 24 565 n.10).

25 District courts regularly dismiss Section 1 claims that fail to answer *Kendall*’s pleading  
 26 questions. For example, in *Bay Area Surgical Management LLC v. Aetna Life Insurance Co.*, 166  
 27 F. Supp. 3d 988 (N.D. Cal. 2015), the plaintiffs alleged a conspiracy among three insurers based on  
 28 a “continuous stream of communications” and “numerous writings, conversations and meetings.”

1 *Id.* at 995-96. The plaintiffs argued that their complaint answered *Kendall*'s questions because: the  
 2 "who" was the three defendant insurers; the "when" was "early 2010 and continuing thereafter";  
 3 and the "what" was restraining competition in the relevant market. *Id.* at 995. In dismissing the  
 4 complaint, the district court held that these "'what,' 'who,' 'where,' and 'when' are" so "lacking in  
 5 factual support" that they would "be impossible to defend against." *Id.*; *see also Credit Bureau*  
 6 *Servs., Inc. v. Experian Info. Sols., Inc.*, No. 12-CV-2146 (JGB), 2013 WL 3337676, at \*8 (C.D.  
 7 Cal. June 28, 2013) (dismissing complaint that "fail[ed] to put forth any facts indicating where,  
 8 when, or who participated in the alleged agreement between Defendants"); *MedioStream, Inc. v.*  
 9 *Microsoft Corp.*, 869 F. Supp. 2d 1095, 1104 (N.D. Cal. 2012) (dismissing claim that alleged  
 10 agreements, but not "whether such agreements are written, oral or tacit, when they were executed,  
 11 who made the decisions, or with which [companies] such agreements were made").<sup>5</sup>

12 Plaintiffs here likewise fail to meet their *Kendall* pleading burden. First, plaintiffs do not  
 13 allege "who" entered into the supposed conspiracy because the complaint does not identify any  
 14 personnel from any defendant who purportedly entered into the conspiracy. *See Kendall*, 518 F.3d  
 15 at 1047 (holding that bare allegation that "banks" entered into alleged conspiracy was insufficient  
 16 because banks "are large institutions with hundreds of employees entering into contracts and  
 17 agreements daily"); *Bay Area Surgical Mgmt.*, 166 F. Supp. 3d at 995 ("[S]imply alleging that E3,

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18  
 19 <sup>5</sup> *See also William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009)  
 20 ("Despite its length and detail, the SAC does not clearly assert which individual agreement or  
 21 agreements constitute in themselves a 'contract . . . by which the persons or entities intended to  
 22 harm or restrain trade.'" (alteration in original) (quoting *Kendall*, 518 F.3d at 1047)); *Rick-Mik*  
 23 *Enters. Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 976 (9th Cir. 2008) (affirming dismissal of  
 24 Section 1 claims where "[a]ll that is alleged is there was an agreement on price . . . . The nature of  
 25 the conspiracy or agreement is not alleged. The type of agreements are not alleged."); *In re Late*  
 26 *Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) (affirming dismissal of  
 27 Section 1 claim because the complaint included "several conclusory allegations that the defendants  
 28 agreed to increase late fees, but [provided] no details as to when, where, or by whom this alleged  
 agreement was reached"), *aff'd*, 741 F.3d 1022 (9th Cir. 2014); *Stanislaus Food Prod. Co. v. USS-*  
*POSCO Indus.*, 782 F. Supp. 2d 1059, 1075 (E.D. Cal. 2011) ("Here, the Court finds that plaintiff's  
 allegations of the Market Allocation Agreement are conclusory and non-specific. Plaintiffs'  
 allegations do not put Defendants on notice with enough sufficiency to form the basis for a  
 response."); *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1188 (S.D. Cal. 2002) (allegations  
 that defendants "[c]ontracted, conspired, and agreed to set . . . prices . . . using a vertical price-  
 fixing scheme" were conclusory and insufficient to withstand a motion to dismiss); *Int'l Norcent*  
*Tech. v. Koninklijke Philips Elecs. N.V.*, No. 07-CV-00043 (MMM), 2007 WL 4976364, at \*10  
 (C.D. Cal. Oct. 29, 2007) (plaintiff "has not alleged when the purported agreement was  
 made . . . who made the decision, how it was made or what the parameters of the agreement  
 were"), *aff'd*, 323 F. App'x 571 (9th Cir. 2009).

1 Aetna, and United conspired is not a sufficient allegation of the ‘who’[] [because] Defendant  
2 Insurers are large organizations . . . .”). Even though plaintiffs claim access to three former  
3 Rainmaker employees, the complaint fails to identify any employee from any Hotel Defendant who  
4 adopted any price recommended by any Revenue Management Product for any hotel room on the  
5 Las Vegas Strip at any time, let alone who formed (or participated in) the purported conspiracy.  
6 (*See* ECF No. 1 ¶¶ 16, 21.)

7 Second, plaintiffs do not allege “when” the purported conspiracy was formed, a deficiency  
8 that plaintiffs concede with their allegation that the conspiracy “beg[an] at a time currently  
9 unknown.” (*Id.* ¶ 87.) The complaint is equally deficient and unclear about when Hotel  
10 Defendants allegedly began subscribing to a Revenue Management Product for any of their hotels  
11 on the Las Vegas Strip, referring only to a source from 2012 relating to Treasure Island (*see id.* ¶  
12 16 & n.7) but later claiming room rates increased in 2022 (*id.* ¶ 23). Just as “early 2010 and  
13 continuing thereafter” was insufficient to state a claim in *Bay Area Surgical*, 166 F. Supp. 3d at  
14 995, plaintiffs’ inability to identify the timing of any purported conspiracy here likewise fails to  
15 meet the *Kendall* standard.

16 Third, plaintiffs fail to allege “what” Hotel Defendants did to form an agreement, how any  
17 supposed agreement would operate, or how defendants monitor or enforce compliance with any  
18 such agreement. Plaintiffs’ failure is particularly glaring because they do not allege any  
19 communication between Hotel Defendants—not a single call, email, or text message. *See Credit*  
20 *Bureau Servs.*, 2013 WL 3337676, at \*8 (dismissing complaint in which “[n]one of the factual  
21 allegations demonstrate that anyone at CoreLogic ever communicated with or even was in the same  
22 room as anyone at Experian, let alone that their communications involved an illicit agreement”).  
23 Plaintiffs’ conclusory allegations that there was an “agreement among Defendants to use pricing  
24 algorithms provided by Rainmaker Group” (ECF No.1 ¶ 88; *see also id.* ¶ 3) are just a “bare  
25 assertion of conspiracy” that “will not suffice.” *Twombly*, 550 U.S. at 556; *see also id.* at 552  
26 (holding allegations that the defendants “have entered into a contract, combination or conspiracy to  
27 prevent competitive entry in their respective local telephone and/or high speed internet services  
28 markets” were insufficient); *Kendall*, 518 F.3d at 1047-48 (affirming dismissal because “appellants

1 pleaded only ultimate facts, such as conspiracy, and legal conclusions”).

2 At most, plaintiffs rely on allegations from unnamed former Rainmaker employees, who  
 3 allegedly stated that “Caesars probably knew [Rainmaker was] in the Cosmopolitan and vice  
 4 versa” (ECF No. 1 ¶ 22) and identified the existence of an annual user conference (*id.* ¶ 74). Those  
 5 allegations, however, are plainly insufficient. What unidentified employees “probably knew”  
 6 about software being used at other hotels is, on its face, speculation—and, in any event, not  
 7 evidence of any agreement among Hotel Defendants to use any particular software or Rainmaker  
 8 product. As to the annual user conference, nowhere does the complaint allege that any Hotel  
 9 Defendant (let alone each) attended any specific meeting or event, that Hotel Defendants ever met  
 10 with each other, or what (if anything) they discussed—much less that any or all of them reached  
 11 any agreement at such a meeting. *See Kelsey K. v. NFL Enters., LLC*, 254 F. Supp. 3d 1140, 1144  
 12 (N.D. Cal. 2017) (dismissing complaint because it failed to “provide the details . . . regarding some  
 13 actual conspiratorial meeting, communication, or agreement”), *aff’d*, 757 F. App’x 524 (9th Cir.  
 14 2018); *see also id.* (“[O]ur court of appeals refused to infer conspiracy from the mere fact that trade  
 15 associations gathered information about pricing and competition because such activities constituted  
 16 ‘standard fare’ . . . .”) (citing *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999)); *In re*  
 17 *German Auto. Mfrs. Antitrust Litig.*, 392 F. Supp. 3d 1059, 1071-72 (N.D. Cal. 2019) (rejecting  
 18 trade association allegations where plaintiffs “almost never identify what was agreed to in these  
 19 meetings and instead only vaguely refer to ‘clandestine agreements to limit technological  
 20 innovation’”).

21 Thus, because the complaint fails to answer the “basic questions” posed by *Kendall*, it fails  
 22 to state a plausible claim, and the Court should dismiss the complaint for this reason alone.

## 23 **II. PLAINTIFFS FAIL TO ALLEGE DIRECT OR** 24 **CIRCUMSTANTIAL EVIDENCE OF THE PURPORTED CONSPIRACY**

25 Even if plaintiffs’ failure to answer *Kendall*’s “basic questions” could be set aside, their  
 26 complaint should still be dismissed because it lacks allegations reflecting direct or circumstantial  
 27 evidence of a conspiracy among Hotel Defendants. Under Section 1 of the Sherman Act,  
 28 agreements that are “made up and down a supply chain, such as between a manufacturer and a

retailer,” are considered vertical agreements, and agreements that are made among competitors are considered horizontal agreements. *Musical Instruments*, 798 F.3d at 1191. Pleading a “hub-and-spoke” conspiracy involves both vertical and horizontal agreements, requiring plaintiffs to allege: “(1) a hub . . .; (2) spokes, such as competi[tors] that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes.” *Id.* at 1192 (affirming dismissal because the plaintiffs failed to plead facts supporting an inference of a horizontal agreement among the spoke competitors). In a “hub-and-spoke” claim, the “key agreements are those among the defendant [spokes]” because the claim “depends on establishing those horizontal agreements” among competitors. *Id.* at 1193; *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010) (“[T]he critical issue for establishing a per se violation with the hub and spoke system is how the spokes are connected to each other.” (alteration in original) (citation omitted)); *Rheumatology Diagnostics Lab’y, Inc. v. Aetna, Inc.*, No. 12-CV-05847 (WHO), 2013 WL 5694452, at \*10 (N.D. Cal. Oct. 18, 2013) (“[T]he FAC only alleges individual agreements between each insurer and Quest. There is no sufficiently pleaded horizontal agreement.”).

Plaintiffs’ theory appears to be that Rainmaker (the “hub”) entered into vertical agreements with each Hotel Defendant (the “spokes”) to license one or more of the Revenue Management Products. The agreement that plaintiffs challenge is a purported horizontal “agreement among Defendants to use pricing algorithms provided by Rainmaker.” (ECF No. 1 ¶ 88.) But as explained below, plaintiffs do not allege direct or circumstantial evidence plausibly suggesting a horizontal agreement among Hotel Defendants to use any Revenue Management Product.<sup>6</sup>

#### **A. Plaintiffs Plead No Direct Evidence of a Conspiracy**

Plaintiffs plead nothing resembling direct evidence because no allegations directly establish that Hotel Defendants agreed to use any Revenue Management Product. Direct evidence is

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<sup>6</sup> While plaintiffs fail to identify any vertical agreement between Rainmaker and/or Cendyn and a hotel licensing any particular Revenue Management Product, they also do not challenge any such agreement as unlawful. That is because any such agreement is vertical, and any alleged restraint resulting from each individual agreement would need to be analyzed separately. *See Musical Instruments*, 798 F.3d at 1192 & n.3. And the complaint does not plead any facts or even claim that any individual licensing agreement between Rainmaker and a hotel harms competition.

“tantamount to an acknowledgment of guilt,” *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002), because it establishes a conspiracy “without requiring any inferences,” *In re Citric Acid Litig.*, 191 F.3d at 1093-94 (citing *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999)). Pleading direct evidence is a steep burden because it requires alleging “smoking gun[s],” such as “a recorded phone call in which two competitors agreed to fix prices at a certain level,” *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013), or an executive’s statement that some defendants got “in a room and work[ed] together” to reach an illegal agreement, *B & R Supermarket, Inc. v. Visa, Inc.*, No. 16-CV-01150 (WHA), 2016 WL 5725010, at \*7 (N.D. Cal. Sept. 30, 2016); *see also Alvarado v. Western Range Ass’n*, 22-CV-00249 (MMD), ECF No. 43, Order Denying Motion to Dismiss (D. Nev. Mar. 21, 2023), at \*13 (concluding that employee’s testimony established direct evidence of agreement to fix wages).

Here, far from pleading direct evidence of the alleged agreement among Hotel Defendants, plaintiffs allege that they do not know when or how the purported conspiracy was formed. Nor do the complaint’s alleged statements from three supposed former Rainmaker employees, characterized as “confidential witnesses,” come close to establishing an agreement among Hotel Defendants to use any Revenue Management Product. Instead, the statements attributed to those individuals merely allege some aspects of how the Revenue Management Products supposedly work (ECF No. 1 ¶¶ 7-16, 22, 24, 57-59, 71, 74-75), but they say nothing about the purported conspiracy among Hotel Defendants, *see Frost v. LG Elecs., Inc.*, 801 F. App’x 496, 498 (9th Cir. 2020) (“[Plaintiffs] rely on various statements made by defendants’ employees . . . as direct evidence of agreement. But each of these statements requires inferences in order to support the existence of a conspiracy and are, therefore, not direct evidence.”); *In re GSE Bonds Antitrust Litig.*, 396 F. Supp. 3d 354, 364 (S.D.N.Y. 2019) (“[Plaintiffs] allege[] that a ‘cooperating co-conspirator’ has provided examples of price-fixing conversations . . . [b]ut this unadorned allegation, without any specifics, cannot salvage the pleading against these defendants.”). Indeed, none of the statements attributed to the “confidential witnesses” even hint—let alone directly state—that Hotel Defendants agreed to each use any Revenue Management Product, agreed to

1 follow those Products’ pricing suggestions even once, or ever shared any confidential information.  
 2 Accordingly, none of plaintiffs’ allegations provide direct evidence supporting their claim that  
 3 Hotel Defendants agreed to use the Revenue Management Products.

4 **B. Plaintiffs Do Not Plausibly Allege Circumstantial Evidence of a Conspiracy**

5 The complaint also fails to plead any facts that reflect the type of circumstantial evidence  
 6 that could plausibly suggest an agreement among Hotel Defendants to use the Revenue  
 7 Management Products or conspire in any manner. To support a claim based on circumstantial  
 8 evidence, a plaintiff must plead facts demonstrating both (1) “parallel conduct” and (2) “plus  
 9 factors.” *Musical Instruments*, 798 F.3d at 1193-94. If a complaint fails to plausibly allege parallel  
 10 conduct, “‘plus factors’ are . . . irrelevant to determining whether the complaint made out a viable  
 11 Section 1 claim.” *Bona Fide Conglomerate*, 691 F. App’x at 391. But even if a complaint pleads  
 12 parallel conduct, it must also allege “plus factors” that “tend to exclude a plausible and innocuous  
 13 alternative explanation” for the defendants’ conduct. *Eclectic Props. E., LLC v. Marcus &*  
 14 *Millichap Co.*, 751 F.3d 990, 998 (9th Cir. 2014) (affirming dismissal); *see also Kelsey K.*, 254 F.  
 15 Supp. 3d at 1144 (holding that when a “plaintiff relies solely on circumstantial evidence of  
 16 conspiracy, she must allege facts tending to exclude the possibility that defendants acted  
 17 independently”).

18 Dismissal is warranted here because plaintiffs fail to plead parallel conduct or plus factors.

19 1. **The Complaint Fails To Allege Parallel Conduct**

20 Pleading parallel conduct requires plaintiffs to allege that defendants contemporaneously  
 21 engaged in conduct so similar that a conspiracy can be inferred—for instance, that “competitors  
 22 adopt[ed] similar policies around the same time.” *Musical Instruments*, 798 F.3d at 1193. By  
 23 contrast, courts routinely conclude that gradual or “slow adoption of similar policies does not raise  
 24 the specter of collusion.” *Id.* at 1196 (holding that adopting pricing policies “over a period of  
 25 several years” was insufficient to plead parallel conduct); *see also Park Irmat Drug Corp. v.*  
 26 *Express Scripts Holding Co.*, 911 F.3d 505, 516-17 (8th Cir. 2018) (holding that plaintiffs failed to  
 27 plead parallel conduct because alleged actions took place six months apart); *In re Graphics*  
 28 *Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1022 (N.D. Cal. 2007) (explaining that

allegations of parallel conduct “are not so convincing” because allegedly simultaneous conduct occurred only within the same month or within a three-month period).

The complaint here fails to plead any parallel conduct. Plaintiffs do not allege that Hotel Defendants ever subscribed to the same Revenue Management Product or that Hotel Defendants did so at the same time. At best, the complaint suggests that Treasure Island began using Revenue Management Products by 2012. (*See* ECF No. 1 ¶ 16 & n.7 (quoting a Treasure Island employee’s description of Rainmaker in 2012).) But the complaint pleads no facts about when (if at all) Caesars, MGM, or Wynn began using a Revenue Management Product for their hotels on the Las Vegas Strip, let alone that they used the same Revenue Management Product at the same time. *Cf. Alvarado*, ECF No. 43, Order Denying Motion to Dismiss, at \*12 (“The Court finds that Plaintiffs have adequately established parallel conduct by alleging that WRA’s members contemporaneously offer wages to sheepherders largely at the minimum allowable wage, which is supported by factual allegations of a review of recent and current job orders for domestic sheepherders posted by Defendant and H-2A applications for foreign sheepherders submitted by Defendant.”).

The complaint is equally devoid of allegations that any (let alone all) Hotel Defendants adopted a Revenue Management Product’s suggested prices for any hotel or room, let alone that Hotel Defendants did so in parallel. The complaint alleges only that “[f]ollowing widespread adoption of Rainmaker’s pricing algorithms, Defendant Hotel Operators swiftly shifted from the previous competitive status quo to a new strategy.” (ECF No. 1 ¶ 47.) But that conclusory statement lacks any factual support in the complaint and is entitled to no weight. *See Kendall*, 518 F.3d at 1048 (rejecting allegation that was “nothing more than a conclusory statement” with “no facts alleged to support such a conclusion”). Further, it reflects “impermissible group pleading” that fails to allege the requisite “specific misconduct” of each defendant. *Aquilina v. Certain Underwriters at Lloyd’s*, 407 F. Supp. 3d 978, 996-98 (D. Haw. 2019); *see also Destfino v. Reiswig*, 630 F.3d 952, 958-59 (9th Cir. 2011) (rejecting plaintiffs’ “everyone did everything” allegations). Similarly deficient are plaintiffs’ allegations that Rainmaker clients nationwide adopt its pricing recommendations 90% of the time (ECF No. 1 ¶ 61) because plaintiffs impermissibly rely on aggregate information that is not tied to Hotel Defendants (let alone each of them) or even

1 the alleged relevant market of the Las Vegas Strip. *See Musical Instruments*, 798 F.3d at 1197  
 2 n.12 (rejecting plaintiffs’ “over-inclusive” data because it “include[d] products outside of the  
 3 relevant product market(s)”).

4 Moreover, the complaint does not identify a single instance in which Hotel Defendants  
 5 priced rooms at the same rate—nor plead that their prices moved in parallel at any time. In fact,  
 6 the complaint fails to identify the price of any room at a defendant’s hotel on any night, even  
 7 though the named plaintiffs supposedly “regularly” stay at defendants’ Las Vegas Strip hotels  
 8 (ECF No. 1 ¶¶ 26-27), and notwithstanding the fact that hotel pricing—on the Las Vegas Strip and  
 9 otherwise—is publicly available via several online sources, including search sites, online travel  
 10 agencies, and the hotels’ own websites. The complaint’s only reference to room rates is a news  
 11 report regarding Las Vegas-wide pricing in September 2022 (*id.* ¶ 23), but the Ninth Circuit has  
 12 rejected similar allegations based on market-wide averages as insufficient to allege that each  
 13 defendant’s prices moved upwards in parallel. *See Musical Instruments*, 798 F.3d at 1197 n.12  
 14 (holding that allegations that average of all retail prices rose were insufficient because “[a]s far as  
 15 we can tell from the complaint, retail prices of defendants’ products actually might have fallen  
 16 during the class period. . . . Plaintiffs make no allegation either way”); *see also In re GSE Bonds*  
 17 *Antitrust Litig.*, 396 F. Supp. 3d at 365 (holding that while market-wide data could “plausibly  
 18 imply that defendants, as a group, were charging higher prices,” the “Court cannot infer, from this,  
 19 that each individual defendant was charging higher prices”).<sup>7</sup>

20 Thus, plaintiffs fail to plead parallel conduct, and for this reason alone, they cannot allege a  
 21 viable claim through circumstantial evidence because they have nothing plausibly suggesting that  
 22 the Hotel Defendant “spokes” agreed to use any Revenue Management Product provided by the  
 23 “hub.”

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24  
 25 <sup>7</sup> The Complaint insinuates several times that hotels should always “maximiz[e] occupancy of  
 26 hotel rooms” (ECF No. 1 ¶ 9), and that “in a competitive market, any empty hotel room is lost  
 27 revenue, so a hotel operator would try to fill each hotel room by granting concessions or lowering  
 28 prices” (*id.* ¶ 10). Yet the complaint does not allege Hotel Defendants’ occupancy rates, how those  
 rates compare to one another, or how those rates have changed (if at all) since Hotel Defendants  
 supposedly began subscribing to the Revenue Management Products. Nor could plaintiffs support  
 their non-sensical conclusory theory that Hotel Defendants should focus on only maximizing  
 occupancy rates to the exclusion of focusing on maximizing total guest revenue, which derives  
 from many other sources (e.g., gaming, restaurants, and shows). (*Cf. id.* ¶ 40.)

2. Plaintiffs’ “Plus Factors” Are Irrelevant  
And Do Not Plausibly Suggest a Conspiracy

The complaint’s reliance on a handful of irrelevant structural market characteristics, which plaintiffs characterize as “plus factors,” is also insufficient to plausibly suggest a conspiracy. As an initial matter, when a plaintiff “has not plausibly alleged any parallel conduct among the defendants,” the complaint’s so-called “‘plus factors’ are therefore irrelevant” and cannot support a viable Section 1 claim. *Bona Fide Conglomerate*, 691 F. App’x at 391; *see also Park Irmat Drug Corp.*, 911 F.3d at 517 (“Because [the plaintiff] fails to plausibly plead parallel conduct, no discussion of any ‘plus factors’ is necessary.”); *In re Pork Antitrust Litig.*, No. 18-CV-1776 (JRT), 2019 WL 3752497, at \*7 (D. Minn. Aug. 8, 2019) (“[I]n the same way that parallel conduct on its own is insufficient to establish an agreement, plus factors without plausible allegations of parallel conduct are insufficient to establish an inference of an agreement.”). Accordingly, because plaintiffs fail to plead parallel conduct, their supposed “plus factors” add nothing to their deficient claim.

Even if plaintiffs had pleaded parallel conduct, their alleged “plus factors” would not make the supposed conspiracy plausible. Plus factors are “economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.” *Musical Instruments*, 798 F.3d at 1194. To adequately plead “plus factors,” plaintiffs must provide factual allegations that plausibly exclude the possibility that defendants acted independently. *See id.* at 1198. Plus factors include conduct against an entity’s apparent economic self-interest, unusual interfirm communications, or an abrupt change in a long-standing business practice or price structure. *See id.* at 1195. By contrast, the “plus factors” identified in the complaint are generic characteristics of the purported market for hotel rooms on the Las Vegas Strip, supposed “exchanges of competitively sensitive information,” and opportunities to collude at trade associations and conferences. (ECF No. 1 ¶ 69.) Taken individually or in the aggregate, the complaint’s alleged “plus factors” are even weaker than those the Ninth Circuit rejected in *Musical Instruments* and *In re DRAM*.

First, plaintiffs’ allegations concerning the structure of the “Las Vegas Strip hotel market,”

1 including that it supposedly has high concentration, significant barriers to entry, inelastic demand,  
 2 and fungible products (ECF ¶¶ 70-73), do not render the alleged conspiracy plausible. Indeed,  
 3 even “extreme concentration” in a market coupled with parallel conduct is consistent with lawful  
 4 “conscious parallel behavior.” *In re DRAM*, 28 F.4th at 52; *see also Musical Instruments*, 798 F.3d  
 5 at 1193 (“In an interdependent market, companies base their actions in part on the anticipated  
 6 reactions of their competitors . . . . [T]wo firms may arrive at identical decisions independently, as  
 7 they are cognizant of—and reacting to—similar market pressures.”).<sup>8</sup> Further, the alleged  
 8 characteristics of the market for hotels on the Strip do not suggest a conspiracy because the  
 9 complaint contains no allegations suggesting that they could not equally promote independent  
 10 action. *See, e.g., In re DRAM*, 28 F.4th at 52 (holding that high market concentration did not  
 11 support finding of conspiracy, and plaintiffs needed to allege facts in addition to the “market’s  
 12 structure to plausibly suggest conspiracy”); *Evanston Police Pension Fund v. McKesson Corp.*, 411  
 13 F. Supp. 3d 580, 597 (N.D. Cal. 2019) (rejecting argument that market features such as “inelastic  
 14 demand, high barriers to entry, and lack of viable substitutes” supported a finding of conspiracy).

15 Second, plaintiffs assert the existence of “exchanges of competitively sensitive information  
 16 among horizontal competitors” (ECF No. 1 ¶ 69), citing allegedly “regular contact” between  
 17 Rainmaker advisors and Hotel Defendants “to keep them up to date on their competitors” and  
 18 supposed “weekly” meetings between Rainmaker and unidentified hotels (*id.* ¶ 75). But these  
 19 allegations are insufficient because they fail to identify which hotel employees had meetings with  
 20 Rainmaker or whether those hotels are even defendants in this case. Moreover, plaintiffs fail to  
 21 plead any facts supporting their conclusory assertion that “competitively sensitive information”  
 22 was exchanged during the unidentified hotels’ purported meetings with Rainmaker. For example,  
 23 plaintiffs do not allege what information was exchanged among which competitors, what made it  
 24 “sensitive,” or when it supposedly was exchanged. Further, plaintiffs tellingly avoid alleging that  
 25 any Revenue Management Product facilitated the exchange of any confidential or non-public

26  
 27 <sup>8</sup> In fact, courts have recognized that “as the number of firms in a market declines, it . . . becomes  
 28 increasingly likely that lawful conscious parallel behavior or interdependent pricing . . . will occur  
 without prior agreement.” *Jones v. Micron Tech. Inc.*, 400 F. Supp. 3d 897, 917 (N.D. Cal. 2019)  
 (citing *In re Coordinated Pretrial Proc. in Petroleum Prod. Antitrust Litig.*, 906 F.2d 432, 443 (9th  
 Cir. 1990)).

1 information between Hotel Defendants.<sup>9</sup> Accordingly, this allegation of “exchanges of  
2 competitively sensitive information” is deficient and entitled to no weight.

3 Third, plaintiffs’ assertion that defendants had “ample opportunities to collude” is equally  
4 deficient. Plaintiffs allege only that Rainmaker hosted an “in-person ‘annual user conference[]’”  
5 where employees of unidentified hotels and Rainmaker employees could “network, exchange  
6 insights and ideas, and discuss revenue management tools and new products coming.” (*Id.* ¶ 74.)  
7 But the complaint fails to allege that any Hotel Defendant actually attended any such annual  
8 conference. Nor does the complaint include factual allegations about the contents of any purported  
9 discussion that took place at a user conference hosted by Rainmaker. Further, as noted above, it is  
10 well settled that “mere participation in trade-organization meetings where information is  
11 exchanged and strategies are advocated does not suggest an illegal agreement.” *Musical*  
12 *Instruments*, 798 F.3d at 1196; *see also In re Citric Acid*, 191 F.3d at 1098 (“Gathering information  
13 about pricing and competition in the industry is standard fare for trade associations. If we allowed  
14 conspiracy to be inferred from such activities alone, we would have to allow an inference of  
15 conspiracy whenever a trade association took almost any action.”).<sup>10</sup>

16 Fourth, although plaintiffs generically allege that “hotel guest rooms are relatively fungible,  
17 particularly within classes of properties” (ECF No. 1 ¶ 73), plaintiffs fail to allege facts suggesting  
18 that Hotel Defendants’ properties and rooms are interchangeable or are in the same class of  
19 properties. For instance, there are no allegations plausibly suggesting that a prospective guest

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20 <sup>9</sup> The allegations of information exchange between a hotel and Rainmaker/Cendyn (ECF  
21 No. 1 ¶¶ 75, 89) are irrelevant to the alleged conspiracy among Hotel Defendants. As in *Musical*  
22 *Instruments*, the “key agreements” for plaintiffs’ claim are the alleged horizontal agreements  
23 between Hotel Defendants, and information supposedly exchanged solely between a hotel and  
Rainmaker/Cendyn can offer no support to any such alleged horizontal agreement. *See Musical*

24 <sup>10</sup> *See also, e.g., In re Nat’l Ass’n of Music Merchs.*, MDL No. 2121, 2012 WL 3637291, at \*2  
(S.D. Cal. Aug. 20, 2012) (attendance at trade shows is “normal business activity, and doesn’t  
25 imply any kind of illegality”), *aff’d sub nom. In re Musical Instruments & Equip. Antitrust Litig.*,  
798 F.3d 1186 (9th Cir. 2015); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 911 (6th  
26 Cir. 2009) (attendance at industry conferences “is more likely explained by lawful, free-market  
behavior”); *Cosm. Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 53 (3d Cir. 2007) (“We have  
27 previously noted that proof of opportunity alone is insufficient to sustain an inference of  
conspiracy . . . .”); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1319 (11th Cir. 2003)  
28 (noting that the court had “unambiguously held” that “the mere opportunity to conspire among  
antitrust defendants does not, standing alone, permit the inference of conspiracy”) (internal  
citations omitted).

1 would book a room at the Wynn if Treasure Island were sold out. Plaintiffs even admit that  
2 “[g]uests choose hotels within certain overall categories.” (*Id.* (emphasis added).) But plaintiffs  
3 never plead what those categories might be, or whether every hotel on the Las Vegas Strip owned  
4 by the Hotel Defendants falls into the same category. Nor could plaintiffs do so—as anyone who  
5 lives in, or has visited, Las Vegas knows.

6 Finally, plaintiffs have failed to meet their burden of alleging facts that “tend to exclude a  
7 plausible and innocuous alternative explanation” for defendants’ alleged conduct. *Eclectic Props.*,  
8 751 F.3d at 998. Instead, the complaint’s factual allegations suggest reasons why subscribing to  
9 the Revenue Management Products would result from “rational, legal business behavior.” *Kendall*,  
10 518 F.3d at 1049. The complaint is replete with allegations suggesting that it could be in a hotel’s  
11 independent interest to use one or more Revenue Management Products because, for example,  
12 casino hotels allegedly had no “real-time data to back up” their pricing decisions, leading them to  
13 “over-discount” their rooms. (ECF No. 1 ¶ 45.) In addition, plaintiffs allege that “Rainmaker  
14 Group advertises that clients who use GuestRev see increases in revenue and profitability.” (*Id.*  
15 ¶ 52.) And the alleged endorsements of Rainmaker by hotels that are not alleged to have any  
16 connection to the purported conspiracy further support the non-conspiratorial reasons for using the  
17 Revenue Management Products. (*See, e.g., id.* ¶ 19 (endorsement from Westmont Hospitality  
18 Group); *id.* ¶¶ 20, 56 (endorsement from Omni Hotels & Resorts); *id.* ¶ 24 (touting success of  
19 Rainmaker products at Foxwoods Hotels).) As in *Musical Instruments*, plaintiffs here “have  
20 indeed provided a context” for hotels’ alleged use of the Revenue Management Products, “but not  
21 one that plausibly suggests they entered into illegal horizontal agreements.” *Musical Instruments*,  
22 798 F.3d at 1198.

23 Thus, plaintiffs’ alleged “plus factors” are irrelevant given the complaint’s failure to plead  
24 parallel conduct, but even if those factors are considered, they do not plausibly suggest the  
25 existence of the purported conspiracy.

## CONCLUSION

The complaint should be dismissed because it fails to answer any of the mandatory pleading questions established by the Ninth Circuit. The complaint also should be dismissed because it fails to plead any facts reflecting either direct or circumstantial evidence of an agreement among Hotel Defendants to use the Revenue Management Products. The Court should dismiss the complaint with prejudice because any attempt by plaintiffs to amend their complaint would be futile in light of the implausibility of their claim, and an amendment would only waste the Court's and defendants' resources. *See Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989) (affirming dismissal with prejudice because additional cost of "continued litigation on a new theory . . . would cause undue prejudice" to defendants) (citation omitted).

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Respectfully submitted,

/s/ Todd L. Bice

/s/ Adam Hosmer-Henner

Todd L. Bice (NSBN 4534)

Adam Hosmer-Henner (NSBN 12779)

Brianna Smith (NSBN 11795)

Chelsea Latino (NSBN 14227)

PISANELLI BICE PLLC

Jane Susskind (NSBN 15099)

400 S. 7th Street, Suite 300

McDONALD CARANO LLP

Las Vegas, NV 89101

100 West Liberty Street, Tenth Floor

Telephone: 702-214-2100

Reno, Nevada 89501

tlb@pisanellibice.com

(775) 788-2000

bgs@pisanellibice.com

ahosmerhenner@mcdonaldcarano.com

clatino@mcdonaldcarano.com

jsusskind@mcdonaldcarano.com

Bethany Kristovich (*pro hac vice*)

Kyle Mach (*pro hac vice*)

Boris Bershteyn (*pro hac vice*)

Justin Raphael (*pro hac vice*)

Ken Schwartz (*pro hac vice*)

Juliana Yee (*pro hac vice*)

Michael Menitove (*pro hac vice*)

MUNGER, TOLLES & OLSON LLP

Sam Auld (*pro hac vice*)

350 S. Grand Ave.; 50th Floor

SKADDEN, ARPS, SLATE,

Los Angeles, CA 90071

MEAGHER & FLOM LLP

Telephone: 213 683 9100

One Manhattan West

bethany.kristovich@mto.com

New York, New York 10001

kyle.mach@mto.com

(212) 735-3000

justin.raaphael@mto.com

Boris.Bershteyn@skadden.com

juliana.yee@mto.com

Ken.Schwartz@skadden.com

Michael.Menitove@skadden.com

Sam.Auld@skadden.com

*Attorneys for Defendant MGM Resorts International*

*Attorneys for Defendant*

*Caesars Entertainment, Inc.*

/s/ Patrick G. Byrne

Patrick G. Byrne  
Nevada Bar No. 7636  
Bradley Austin  
Nevada Bar No. 13064  
SNELL & WILMER  
3883 Howard Hughes Parkway  
Las Vegas, NV 89169  
Telephone: (702) 784-5200  
Facsimile: (702) 784-5252  
pbyrne@swlaw.com  
baustin@swlaw.com

Mark Holscher (*pro hac vice*)  
Tammy Tsoumas (*pro hac vice*)  
Leonora Cohen (*pro hac vice*)  
KIRKLAND & ELLIS LLP  
2049 Century Park East, Suite 3700  
Los Angeles, California 90067  
Telephone: (310) 552-4200  
Facsimile: (310) 552-5900  
ttsoumas@kirkland.com  
mholscher@kirkland.com  
lena.cohen@kirkland.com

Matthew Solum (*pro hac vice*)  
KIRKLAND & ELLIS LLP  
601 Lexington Ave  
New York, NY 10022  
Telephone: (212) 446-4688  
Facsimile: (917) 848-7536  
msolum@kirkland.com

*Attorneys for Defendant Wynn  
Resorts Holdings, LLC*

/s/ J. Colby Williams

J. Colby Williams (5549)  
710 South Seventh Street  
Las Vegas, NV 89101  
Telephone: (702) 382-5222  
Facsimile: (702) 382-0540  
jcw@cwalawlv.com

Sadik Huseny (*pro hac vice*)  
Tim O'Mara (*pro hac vice*)  
Brendan A. McShane (*pro hac vice*)  
LATHAM & WATKINS LLP  
505 Montgomery Street, Suite 2000  
San Francisco, CA 94111-6538  
Telephone: (415) 391-0600  
Facsimile: (415) 395-8095  
sadik.huseny@lw.com  
tim.o'mara@lw.com  
brendan.mcshane@lw.com

Anna M. Rathbun (*pro hac vice*)  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW Suite 1000  
Washington, DC 20004-1304  
Telephone: (202) 637-3381  
Facsimile: (202) 637-2201  
anna.rathbun@lw.com

*Attorneys for Defendant Cendyn Group LLC*

/s/ Nicholas J. Santoro

Nicholas J. Santoro (NV Bar No. 532)  
300 S. 4<sup>th</sup> Street, Suite 1600  
Las Vegas, NV 89101  
Tel.: (702) 791-0308 / Fax: (702) 791-1912  
nsantoro@nevadafirm.com

Arman Oruc (*pro hac vice forthcoming*)  
GOODWIN PROCTER LLP  
1900 N Street, N.W.  
Washington, DC 20036-1612  
Tel.: (202) 346-4000 / Fax: (202) 346-4444  
AOruc@goodwinlaw.com

Alicia Rubio-Spring (*pro hac vice*)  
GOODWIN PROCTER LLP  
100 Northern Avenue  
Boston, MA 02110  
Tel.: (617) 570-1000 / Fac: (617) 523-1231  
ARubio-Spring@goodwinlaw.com

*Attorneys for Defendant The Rainmaker Group  
Unlimited, Inc.*

/s/ Patick J. Reilly

Patrick J. Reilly  
Arthur A. Zorio  
Emily Garnett (*pro hac vice*)  
Eric D. Walther  
BROWNSTEIN HYATT FARBER  
SCHRECK, LLP  
100 North City Parkway, Ste. 1600  
Las Vegas, NV 89106  
Telephone: 702.382.2101  
preilly@bhfs.com  
azorio@bhfs.com  
egarnett@bhfs.com  
ewalther@bhfs.com

*Attorneys for Defendant Treasure Island, LLC*